IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 350

LA SALLE-MADISON HOTEL COMPANY,
Petitioner,

vs.

WILLIAM DUNSTERVILLE DENHAM,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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MAY IT PLEASE THE COURT:

The Respondent submits herewith his Brief in Opposition to the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

The Opinion of the Circuit Court of Appeals fully reviews the authorities we have been able to find, applicable to the situation in the instant case, as well as the authorities cited by the Petitioner. We shall, therefore, not reiterate or repeat what is said in the Opinion of the Circuit Court of Appeals, as it speaks for itself, and this Brief is confined to matters which do not fully appear from said Opinion.

SUMMARY OF ARGUMENT.

I.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With an Applicable Decision of the Supreme Court of Illinois.

II.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With a Decision of This Court.

III.

The Reinstatement Clause in the Policy Did Not Operate to Reinstate the Insurance Until Payment Was Made Under the Policy, and Then Reinstated the Policy Only as to Subsequent Losses.

IV.

The Insurers' Agreement to Defend the Claim Respecting Insurance Afforded by the Policy Does Not Obligate the Insurers to Defend Against Any Claim or Suit After Their Liability for Losses Under the Policy Has Been Exhausted.

ARGUMENT.

On Page 1 of the Petition for Writ of Certiorari it is erroneously stated that the Opinion of the Circuit Court of Appeals is reported in 169 Fed. (2d) 576. The Opinion is reported in 168 Fed. (2d) 576. In the Opinion contained in the Record, on Page 72, the case of *Case* v. *Hartford Fire Insurance Co.* is erroneously stated to be reported at 113 Ill. 676, whereas it should be stated that it is reported at 13 Ill. 676.

I.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With an Applicable Decision of the Supreme Court of Illinois.

Petitioner, as its first reason for requesting a Writ of Certiorari, says that the decision of the United States Circuit Court of Appeals for the Seventh Circuit decided an important question of local law in a way in conflict with and contrary to an applicable decision of the Supreme Court of Illinois. Petitioner cites *Mammina* v. *Homeland Insurance Co.*, 371 Ill. 555. The decision of the Circuit Court of Appeals in this case is not in conflict with and contrary to the decision in the *Mammina* case. In the instant case the Circuit Court of Appeals held that on a factual basis the theft losses occurred during the seventeen-hour period following the time the fire began. The Court said (168 Fed. (2d) 576, at 579; Rec. 71):

> "Thus we think this case must be considered on the factual basis that the theft losses occurred during the seventeen-hour period, during which the property of the guests through no fault of the hotel remained unprotected, and that such losses occurred concurrently with those resulting from fire, smoke and water."

The Court held that all such losses, whether from theft, fire, smoke or water, resulted from "one occurrence or catastrophe".

In the *Mammina* case the insured's truck was involved in a collision and following the collision caught fire. The evidence adduced at the trial disclosed that the truck was worth $2,000 before the collision; it was worth $350.00 following the collision and before the fire; it was worth $100.00 after the fire. The Court held that the Assured could recover on the fire policy $250.00, representing the value of the truck after the collision, less its value after the fire,

representing the damage to the truck by the fire. We fail to see how there is any conflict between the decision of the Circuit Court of Appeals and the decision in the *Mammina* case, and Petitioner does not disclose wherein there is any such conflict.

Not only is the decision of the United States Circuit Court of Appeals not in conflict with an applicable decision of the Supreme Court of Illinois, but, on the contrary, is in accord with principles declared by the Supreme Court of Illinois almost 100 years ago. In June, 1852, the Supreme Court of Illinois decided *Case* v. *Hartford Fire Insurance Co.*, 13 Ill. 676, which held that goods stolen during the confusion incident to a fire may be recovered as fire losses. The fire, under such circumstances, is regarded as the proximate cause of any loss that is sustained. That principle was applied by the United States Circuit Court of Appeals in making its decision in this case. That case, together with other cases relied upon, are cited and commented upon at length by the United States Circuit Court of Appeals.

Petitioner further states that the importance of the decision lies in the fact that it will govern an interpretation of the extent of the coverage, and further say that if the decision is to stand, the cost to the insuring public must necessarily be astronomical. It is a matter of common knowledge that insurance against risks is undertaken for a premium, and that the premium is in direct proportion to the risk. The premium and the risk are matters of contract between the insured and the insurer. The interpretation placed upon the policy involved in this case could only affect current policies. It would have no effect on policies which have expired, and any policies issued in the future can be written in the light of this decision. The Petitioner's fear of astronomical costs would therefore appear to be unfounded. Moreover, during the period of nearly

100 years since the Illinois Supreme Court decided *Case* v. *Hartford Fire Insurance Co.*, 13 Ill. 676, there has been no case raising the point urged by Petitioner, and it is unlikely that there will be any case arising out of any policy currently in effect in which the decision makes any difference to the insuring public.

Petitioner says the decision of the Circuit Court of Appeals "holds in effect that fire is *ipso facto* and as matter of law the cause of all thefts from the premises which were discovered within a period of 17 hours to several days after the start of the fire." As we have above pointed out, the Circuit Court of Appeals decided that the case must be considered on the factual basis that the theft losses occurred during the seventeen-hour period during which the property of guests remained unprotected. The Court says the reasonable and inescapable inference is that the theft losses took place concurrently with the fire losses, and further says: "The stipulated facts support such an inference" (168 Fed. (2d) 578; Rec. 70). Respecting the fire, the Court said:

> "Here was a fire of catastrophic proportions in a large hotel, with its attending confusion and chaos, during which the management was deprived of the opportunity and perhaps relieved of the responsibility of exercising any care for the protection of its guests and their property. Thus a fertile field and an opportune occasion was furnished for the wholesale thievery disclosed by this record" (168 Fed. (2d) 579; also Rec. 70, 71).

Petitioner says the decision of the Circuit Court of Appeals is regarded as a decision of first impression, because no prior decision interpreting similar provisions has been found, and that the Circuit Court of Appeals so observed. What the Circuit Court of Appeals said was: "No case is cited which from a factual standpoint is analogous to that here presented." (168 Fed. (2d) 579; Rec. 71.)

II.

The Decision of the United States Circuit Court of Appeals in This Case Is Not in Conflict With a Decision of This Court.

As its second reason relied upon for allowance of Writ of Certiorari, Petitioner says the decision of the Circuit Court of Appeals is in conflict with and contrary to a decision of this Court, and cites *Howard Fire Insurance Co.* v. *Norwich & N. Y. Transportation Co.*, 79 U. S. 194. There is no conflict between the decision of the Circuit Court of Appeals and the *Howard Insurance Company* case. The Circuit Court of Appeals held in this case that losses by theft during the confusion incident to a fire may be recovered under a policy for fire insurance; in other words, the theft losses constituted fire losses. In the *Howard Insurance Company* case the Court held that in the absence of a provision expressly excepting loss by fire resulting from collision, a loss caused by fire which resulted from a collision was recoverable under the fire insurance policy, notwithstanding that the fire resulted from the collision. The Court said (79 U. S. 200):

> "In the case before us there is no exception of collisions, or fires caused by collisions. It must therefore be understood that the insurers took the risk of all fires not expressly excepted."

We find no conflict between those two decisions, and Petitioner has not pointed out wherein any such conflict lies.

III.

The Reinstatement Clause in the Policy Did Not Operate to Reinstate the Insurance Until Payment Was Made Under the Policy, and Then Reinstated the Policy Only as to Subsequent Losses.

Petitioner contends that by reason of the provisions of Sections III-B and III-H of the policy the insurance automatically renewed itself immediately upon the happening of any event out of which a claim might arise. Section III-B reads as follows:

> "B. Limits of Liability. The limit of Underwriters' liability for any one occurrence or catastrophe during the Policy period is $10,000 (Ten Thousand Dollars) for all loss of and damage to property of any claimant or claimants.
>
> "Any payment made by Underwriters on account of such loss or damage shall reduce Underwriters' liability by the amount so paid except as provided by Condition H. hereof for reinstatement of Insurance for subsequent losses. The inclusion herein of more than one Assured shall not operate to increase the limits of Underwriters' liability." (Rec. 39.)

Section III-H reads as follows:

> "H. Reduction in Amount of Insurance and Reinstatement. Any payment made under this Policy shall reduce the aggregate amount of Insurance by the amount so paid, but in any such case, the amount of Insurance shall be immediately reinstated as respects any subsequent loss, to apply in accordance with the limits of liability as before any loss occurred." (Rec. 40.)

The Circuit Court of Appeals considered those Sections to mean that the policy was renewed upon the payment of the loss, as respects a loss occurring subsequent to the time of payment. Petitioner does not contend that such

interpretation was contrary to any decision of the Supreme Court of Illinois or the United States.

Petitioner's insurance was insufficient and it attempts to have an interpretation placed upon those provisions of the policy that would make them operate to stretch the $10,000 limit of the insurers liability to a policy of unlimited liability.

IV.

The Insurers' Agreement to Defend the Claim Respecting Insurance Afforded by the Policy Does Not Obligate the Insurers to Defend Against Any Claim or Suit After Their Liability for Losses Under the Policy Has Been Exhausted.

$10,000.00, representing the amount the insurer contended was its full liability for loss, was tendered by the insurer to the Petitioner, and accepted by the Petitioner without prejudice to the rights of either of the parties (Rec. 50).

Petitioner contends that the agreement of the Respondent to defend claims was an undertaking independent of the agreement to pay, as provided by the policy.

The Circuit Court of Appeals held that the obligation to defend was ancillary to the main provision to pay losses. The insurers agreed to defend "as respects insurance afforded by this policy". The defense clause reads as follows:

> "B. Defense, Settlement, Supplementary Payments. It is further agreed that as respects Insurance afforded by this Policy, Underwriters shall—
>
> "1) Defend the Assured in his name and behalf any suit against the Assured alleging such loss and seeking damages on account thereof, even if such suit is groundless, false or fraudulent, but Underwriters shall have the right to make such investigation, nego-

tiations and settlement of any claim or suit as may be deemed expedient by Underwriters; * * *" (Rec. 52).

Petitioner does not contend that the interpretation of the Circuit Court of Appeals of the agreement to defend is contrary to an applicable decision of the Courts of Illinois. It could not so contend. The only Illinois case we have been able to find dealing with the subject is *Brodek* v. *Indemnity Insurance Co.*, 292 Ill. App. 363. In that case the Plaintiff contracted an occupational disease which was not covered by the Workmen's Compensation Act and brought suit against the employer. The Insurance Company had agreed to defend suits and pay claims which would come under the Workmen's Compensation Act. The question presented was whether the insurer was bound to defend the suit. By the terms of the policy the insurer agreed "to defend, in the name and on behalf of this Employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, and allegations or demands are wholly groundless, false or fraudulent". The Court held that the insurer was not obligated to defend the suit for occupational disease, inasmuch as it was not covered by the policy.

Other cases to the same effect are:

Lumbermans Mutual Casualty Co. v. *McCarthy* (N. H.), 8 Atl. (2d) 750, at 751, 752;

Texas Indemnity Co. v. *McLelland* (Tex.), 80 S. W. (2d) 1101;

Pickens v. *Maryland Casualty Co.* (Nebr.), 2 N. W. (2d) 593, at 596;

American Fidelity Co. v. *Deerfield Valley Grain Co.* (Vt.), 43 Fed. Supp. 841, at 844;

Ocean Accident & Guarantee Corp. v. *Peoples Wet*

Wash Laundry Co. (N. H.), 28 Atl. (2d) 418, at 420.

When the insured paid $10,000 in discharge of its liability, it was no longer obligated to defend any claim or suit against the Petitioner.

Conclusion.

We respectfully submit that the decision of the Circuit Court of Appeals is not in conflict with any applicable decision of the Courts of Illinois or of this Court, and the Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit should be denied.

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